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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael Davis,) No. CV 08-0679-PHX-DGC (MEA)
10 Plaintiff,) **ORDER**
11 vs.)
12 Allen Miser, et al.,)
13 Defendants.)
14

15 Plaintiff Michael Davis, who is confined in the Arizona State Prison, Central Unit, in
16 Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and
17 an Application to Proceed *In Forma Pauperis*. (Doc.# 1, 5.)¹ The Court will order
18 Defendant Miser to answer Count I of the Complaint and will dismiss the remaining claim.

19 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
22 The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory
23 fee will be collected monthly in payments of 20% of the previous month's income each time
24 the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a
25 separate Order requiring the appropriate government agency to collect and forward the fees
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28 ¹ "Doc.#" refers to the docket number of filings in this case.

1 according to the statutory formula.

2 **II. Statutory Screening of Prisoner Complaints**

3 The Court is required to screen complaints brought by prisoners seeking relief against
4 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
5 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
6 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
7 be granted, or that seek monetary relief from a defendant who is immune from such relief.
8 28 U.S.C. § 1915A(b)(1), (2).

9 **III. Complaint**

10 Plaintiff alleges two counts in his Complaint for violation of his religious rights and
11 retaliation. He sues only Arizona Department of Corrections chaplain, Allen Miser. Plaintiff
12 seeks injunctive relief.

13 **IV. Failure to State a Claim**

14 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
15 conduct about which he complains was committed by a person acting under the color of state
16 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
17 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
18 suffered a specific injury as a result of the conduct of a particular defendant and he must
19 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
20 Goode, 423 U.S. 362, 371-72, 377 (1976).

21 In Count II, Plaintiff asserts that Chaplain Miser retaliated against him. To state a
22 viable constitutional claim for retaliation, a plaintiff must allege that a defendant acting under
23 color of state law took adverse action against him because he engaged in protected conduct,
24 that the adverse action was not narrowly tailored to advance legitimate correctional goals,
25 and that the adverse action chilled the plaintiff's exercise of his First Amendment rights or
26 caused the prisoner to suffer more than minimal harm. Rhodes v. Robinson, 408 F.3d 559,
27 567-58 (9th Cir. 2005); see also Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997)
28 (retaliation claims requires an inmate to show (1) that the prison official acted in retaliation

1 for the exercise of a constitutionally-protected right, and (2) that the action “advanced no
 2 legitimate penological interest”). An inmate may also state a constitutional violation where,
 3 for example, he alleges that a grievance was denied in retaliation for exercising a
 4 constitutionally-protected right, see Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995), or
 5 in retaliation for filing a grievance, Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th
 6 Cir. 1989).

7 Plaintiff fails to allege any facts to support that Miser retaliated against him for
 8 exercising a constitutional right. He merely alleges that the denial of a vegetarian diet was
 9 retaliation without alleging any facts to support that Miser was retaliating against him based
 10 on his religion. For that reason, Plaintiff fails to state a retaliation claim.

11 **V. Claims for Which an Answer Will be Required**

12 In Count I, Plaintiff alleges that he is a Seventh Day Adventist and that Chaplain
 13 Miser has denied him a vegetarian diet required by his faith. Plaintiff sufficiently alleges a
 14 violation of rights under the First Amendment and the Religious Land Use and
 15 Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1. See Alvarez v. Hill, 518 F.3d
 16 1152, 1157 (9th Cir. 2008). Chaplain Miser will be required to respond to Count I.

17 **VI. Warnings**

18 **A. Release**

19 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
 20 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
 21 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
 22 in dismissal of this action.

23 **B. Address Changes**

24 Plaintiff must file and serve a notice of a change of address in accordance with Rule
 25 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
 26 relief with a notice of change of address. Failure to comply may result in dismissal of this
 27 action.

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1 **C. Copies**

2 Plaintiff must serve Defendant, or counsel if an appearance has been entered, a copy
3 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
4 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
5 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
6 may result in the filing being stricken without further notice to Plaintiff.

7 **D. Possible Dismissal**

8 If Plaintiff fails to timely comply with every provision of this Order, including these
9 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
10 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
11 comply with any order of the Court).

12 **IT IS ORDERED:**

13 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc.# 5.)

14 (2) As required by the accompanying Order to the appropriate government agency,
15 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

16 (3) Count II is **dismissed** without prejudice.

17 (4) Defendant Miser must answer Count I.

18 (5) The Clerk of Court must send Plaintiff a service packet including the
19 Complaint (doc.# 1), this Order, and both summons and request for waiver forms for
20 Defendant Miser.

21 (6) Plaintiff must complete and return the service packet to the Clerk of Court
22 within 20 days of the date of filing of this Order. The United States Marshal will not provide
23 service of process if Plaintiff fails to comply with this Order.

24 (7) If Plaintiff does not either obtain a waiver of service of the summons or
25 complete service of the Summons and Complaint on a Defendant within 120 days of the
26 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
27 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
28 16.2(b)(2)(B)(i).

1 (8) The United States Marshal must retain the Summons, a copy of the Complaint,
2 and a copy of this Order for future use.

3 (9) The United States Marshal must notify Defendant of the commencement of this
4 action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
5 Rules of Civil Procedure. The notice to Defendant must include a copy of this Order. The
6 Marshal must immediately file requests for waivers that were returned as undeliverable and
7 waivers of service of the summons. If a waiver of service of summons is not returned by a
8 Defendant within 30 days from the date the request for waiver was sent by the Marshal, the
9 Marshal must:

10 (a) personally serve copies of the Summons, Complaint, and this Order upon
11 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

12 (b) within 10 days after personal service is effected, file the return of service
13 for Defendant, along with evidence of the attempt to secure a waiver of service of the
14 summons and of the costs subsequently incurred in effecting service upon Defendant.
15 The costs of service must be enumerated on the return of service form (USM-285) and
16 must include the costs incurred by the Marshal for photocopying additional copies of
17 the Summons, Complaint, or this Order and for preparing new process receipt and
18 return forms (USM-285), if required. Costs of service will be taxed against the
19 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
20 Procedure, unless otherwise ordered by the Court.

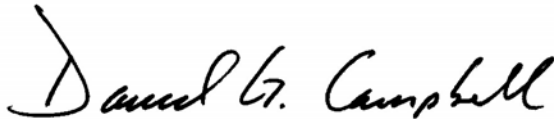
21 (10) **A Defendant who agrees to waive service of the Summons and Complaint**
22 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

23 (11) Defendant must answer the Complaint or otherwise respond by appropriate
24 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
25 Rules of Civil Procedure.

26 (12) Any answer or response must state the specific Defendant by name on whose
27 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
28 does not identify the specific Defendant by name on whose behalf it is filed.

1 (13) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules
2 72.1 and 72.2 of the Local Rules of Civil Procedure for further proceedings.

3 DATED this 7th day of July, 2008.

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7 David G. Campbell
8 United States District Judge
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